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IN THE

Supreme Court of the United States

October Term, 1964

No. 809

PETER GOLDBERG,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit to review its order and judgment entered the 7th day of October, 1964.

Opinions Below

The opinion of the Court of Appeals for the Second Circuit is as yet unreported and is appended hereto at p. 2a, *infra.*

The opinion of the United States District Court for the Southern District of New York (Bryan, U. S. D. J.) on petitioner's motion to set aside the judgment, or, alternatively, to grant a new trial pursuant to FRCP 59 is unreported and is set forth at page 7a of petitioner's appendix (appellant below) in the Court below. The trial court's oral opinion, after trial, is set forth herein at p. 3a, *infra.*

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was dated October 7, 1964, and was entered October 7, 1964.

This Court has jurisdiction under 28 U. S. C. 1254(1).

Question Presented

Is the U. S. Government subject to the provisions of the pre-trial and discovery rules (FRCP 26, *et seq.*) to the same extent as a private citizen, or is the government immune to penalties or sanctions for wilful failure to comply therewith?

Rules Involved

FRCP 26:

> "Rule 26. Depositions Pending Action. (a) When depositions may be taken, any party may take the testimony of any person, including a party, by deposition upon oral examination * * * for the purpose of discovery or for use as evidence in the action or for both purposes. * * *"

Statement

District Court jurisdiction was predicated on 28 U S C 1346 *et seq.*, the Federal Tort Claims Act.

Peter Goldberg suffered injuries on the 11th day of March, 1959, requiring and resulting in his becoming a patient of the defendant-appellee herein.

His first treatment was at Gorgas Hospital, Canal Zone on March 12, 1959, for injuries, including a sub-capital fracture of neck of right femur with impaction into trochanter. Appellee performed an open reduction with

Smith-Peterson nailing of the right hip, resulting in good positioning of the fractures.

The surgical treatment was performed by appellee's Dr. Alan Jackson.

The fractured portions of bone were reduced "in good position."

During the trial, it was stipulated that no malpractice was involved and appellant proceeded exclusively on the theory of post-operative negligence.

By March 30, 1959, the nail had come out of its position, the head of the femur had become so badly damaged that it was necessary to cut away not only the head of the femur, but a great portion of the thigh bone itself, which amputation was replaced by a metal prosthesis.

During the stay at the Gorgas Hospital, appellant was caused to fall from a defective wheelchair and suffer injuries, the effects of which he did not know, nor to what, if any extent it contributed to the destruction of the head of the femur or the further loosening of the pin. Appellant did not recall the exact date of the fall, although he guessed it was March 28, 1959.

Anticipating the need of establishing facts proximately causing or contributing to the amputation, due and timely and various notices were served including the following on February 3, 1961, as follows:

To examine:

"I—The following personnel of Gorgas Hospital, Ancon, Canal Zone, during the period from March 12, 1959 to March 30, 1959:

(a) Director of Hospital,

(b) Director and or Chief of Surgical Service,

(c) Surgeon in actual charge and direction of surgical procedures performed on the plaintiff.

> II—The following personnel of the United States Public Health Service Hospital, Staten Island, New York, during the period from May 3, 1959 to October 23, 1959:
>
> (a) Director of Hospital,
>
> (b) Director or Chief of Surgical Service.
>
> (c) Surgeon in actual charge and direction of surgical procedures performed on the plaintiff, or other duly authorized persons having knowledge of the relevant facts, * * *"

Appellee, by affidavit of the attorney in charge of the defense, dated May 8, 1962, set forth the following as part of the basis for an adjournment of the trial to June 4, 1962 (Appellee's Appendix below, 53b):

> "Plaintiff has noticed examinations of the Administrative Officers of the Gorgas Hospital and of the Staten Island Hospital and of the Surgeon General of the United States. Your deponent has noticed motions returnable on May 10, 1962 to vacate or modify the notices of examinations of the Gorgas Hospital Administrative Officer and of the Surgeon General. *Yesterday, agreement was reached with Mr. Rassner that the controversy over the depositions would be resolved by the Government bringing the Operating Surgeon who operated upon plaintiff's hip at the Gorgas Hospital to New York from the Canal Zone for deposition.* This deposition is tentatively scheduled for some day during the last week of May 1962. Due to the very important nature of this Surgeon's position and his operating schedule at the hospital, it has not been considered practical to withdraw him from his duties on any shorter notice. Until yesterday, it was believed that this witness was in Altoona, Pennsylvania, and easily available for testimony." (Emphasis supplied.)

This doctor was not produced but instead a Dr. Ben L. Hull, whose deposition was taken on May 30, 1962.

Dr. Hull had no personal knowledge of any of the facts, and testified as follows at page 15 (Plaintiff's Exhibit 7):

> "Q. Then you do not know anything about the operation itself, do you? A. Not from actual memory.
>
> Q. So you are not a witness to any fact, are you, as to the operation? A. Not as to the operation.
>
> Q. You know nothing about it, do you? A. Not from direct memory, no, sir.
>
> Q. Do you know anything else about it, other than reading the record? A. The only thing I would know would be reading the record, and seeing the x-ray.
>
> Q. So you can't give us any further information, other than what you read from the record; isn't that so? A. The records and x-rays."

The following took place during Dr. Hull's deposition at pages 8 and 9 (Plaintiff's Exhibit 7):

> "Q. Are you the doctor who operated on Mr. Goldberg? A. No, sir.
>
> Mr. Rassner: May the record show that counsel for the plaintiff considers this a violation of the stipulation that we had stipulated, that the operating surgeon would be produced.
>
> Instead of the operating surgeon being produced, we have a different doctor being produced, which precludes me from the basic and essential presentation of facts, as it was my intention to cross-examine the operating surgeon in lieu of my notice to examine the various officials and doctors of the hospital, and the defendant."

The following colloquy before the court clearly shows the Government's lack of diligence and lack of good faith in wilfully failing to produce the operating surgeon:

> "(3) * * *
>
> Mr. Hopkins: * * *
>
> But to resolve this whole question of these three notices of deposition, I was under the impression,

since I had consulted with Dr. Jackson at the Gorgas Hospital in December 1960, that Dr. Hull was the operating surgeon. Dr. Ben Hull had signed the operative notes. Dr. Jackson told me that although 'Dr. Jackson' was typed in at the top of the operative report as the surgeon, that didn't mean anything because Dr. Hull had actually done it, since he had signed the notes.

I had been under the impression throughout the entire preliminary preparation of this case that Dr. Hull, who is a senior diplomate in orthopedic surgery, had performed this operation, so I said—

The Court: Was Dr. Hull present when the (4) operation was performed?

Mr. Hopkins: He said he was in and out, to his best recollection he was in and out of the room. He was senior orthopedic supervising surgeon of the orthopedic service at the hospital. So to cut the Gordian knot of this deposition I said I would bring Dr. Hull up, he is the operating surgeon. I told Mr. Rassner that. I truly believed that because I had been told that, and he came up. We sent a teletype down and he flew up. He appeared in my office on Memorial Day, in the morning, preparatory to the deposition which took place in Mr. Rassner's office that afternoon.

The first thing I learned when he sat down with me was that he claimed, he contended that he was not the operating surgeon; that Dr. Jackson was the operating surgeon.

So Dr. Jackson—I learned of this and I have since confirmed it—has since left the government employ and now—

The Court: Since when?

* * *

(5) * * *

Mr. Hopkins: He was in December 1960, in our employ. I think he left sometime in 1961.

I called Dr. Jackson the very first thing Thursday morning, the day after Memorial Day, to try to get this straightened out. He is now in Baton Rouge—and I will give Mr. Rassner his address and tele-

phone number—and he said, "Oh, no, I didn't perform the operation; Dr. Hull performed the operation."

I think I have complied with the stipulation in good faith.

(6)

The Court: Let me see the stipulation.

Mr. Hopkins: It was an oral understanding.

The Court: When?

Mr. Hopkins: When was it? When did we have that conversation? I never would have produced this man, Dr. Jackson, if I thought he wasn't in my employ. I never had any intention of producing Dr. Jackson because I didn't think he was the operating surgeon.

* * *

(11) * * *

The Court: Let us cut through this. I understand that Dr. Jackson is not in New York and has not been here, is that correct?

(12)

Mr. Hopkins: To my knowledge he is not and has not been in New York. I don't say that from affirmative knowledge, but he went from the Canal Zone to Baton Rouge, Louisiana.

The Court: Have you ever talked to him?

Mr. Hopkins: No, not in New York, sir.

The Court: You talked to him in the Canal Zone?

Mr. Hopkins: In the Canal Zone and by telephone last Thursday to Baton Rouge, from my office.

The Court: He is still in Baton Rouge, as far as you know?

Mr. Hopkins: He is in Baton Rouge.

Mr. Rassner: If he comes to New York may I have the opportunity to examine him before—

The Court: If he comes to New York, Mr. Rassner—

Mr. Rassner: That is all I want.

The Court: —you may examine him before he goes on the stand, if he comes to New York.

Mr. Hopkins: I have no intention of bringing him up. He can't add anything to the case.

* * *

(208) * * *

Mr. Hopkins: A mere reiteration of what I think I told you on the earlier application in chambers, to the effect that at the time I made this affidavit, due to the examination of the records, I was under the firm impression that Dr. Hull was the operating surgeon. I agreed to bring him up from the Canal Zone. Dr. Jackson was not at that time in our employ. I had spoken to Dr. Jackson in the Gorgas Hospital in December 1960. He had told me that Dr. Hull was the operating surgeon and it was on that basis that I agreed to bring Dr. Hull to the New York area for a deposition. When I said the operating surgeon, I meant Dr. Hull because I was under the firm impression that he had performed the operation, and that was the basis on which he was brought to New York, and I submit that shows the good faith on the—

(209)

The Court: Dr. Hull was brought to New York.

Mr. Hopkins: Yes, sir.

The Court: For examination by Mr. Rassner.

Mr. Hopkins: He was examined by Mr. Rassner, put on the stand and cross examined. Dr. Jackson is no longer—

The Court: When did that examination take place?

Mr. Hopkins: The examination before trial took place on Memorial Day.

The Court: On May 30th.

Mr. Hopkins: On May 30th, yes, sir.

Mr. Rassner: In view of what Mr. Hopkins has stated, I offer in evidence the deposition which shows all my objections reserved and my retaining the right to move to strike the answer, that I didn't consider that bringing Dr. Hull was in compliance with this unconditional stipulation to bring the operating surgeon, and how important it became was

apparent from the testimony and the great prejudice to the plaintiff was also apparent from the testimony.

However, for the record, I offer in evidence the entire deposition of Dr. Hull to show—

The Court: For the limited purpose of (210) showing what occurred at that time.

Mr. Rassner: Yes, your Honor.

The Court: And not for the purpose of the truth of the—

Mr. Rassner: Not at all.

The Court: —facts concerning—

Mr. Rassner: That's right, to eliminate any question, I didn't stipulate away the conditions of this stipulation but held the government to a strict compliance with the stipulation and charged him with the violation of it in not notifying me in time to get the deposition of Dr. Jackson myself. Well, in any event, I offer it in evidence. I offer the deposition for that limited purpose.

* * *

(211) * * *

The Court: I will take the deposition for the limited purpose offered so the record may be complete.

Mr. Hopkins: I have no objection to anything going in.

(Received in evidence as Plaintiff's Exhibit 7.)

* * *

(215) * * *

Mr. Hopkins: The notices of the 3rd of February 1961 to examine these doctors were never enforced. I don't have my file with me. A year later, after the settlement negotiations were conducted and they fell through, a further notice was received which was not to examine the surgeon but to examine the administrative officer of the Gorgas Hospital and, as I said to your Honor, to examine the administrative officer of the Staten Island Hospital and the Surgeon General of the United States. In order to resolve certain contentions on the part of the

government with respect to those depositions, we resolved the whole thing down into the production of Dr. Hull, *who I thought was the operating surgeon.* The terms of the (216) resolution of the dispute as to the deposition contained in my affidavit of May 8th and all of these previous maneuverings and to examinations of doctors and the Surgeon General and all that, I think is completely moot because they were replaced by further notices which were resolved by the agreement to produce the doctor *who I thought was the surgeon in charge.* (Emphasis supplied.)

* * *

I spoke to Dr. Jackson on the telephone the very next morning, as I told you. He said, "*I did not operate; Dr. Ware operated.*" (Emphasis supplied.)

* * *

Dr. Jackson related solely to malpractice, which has been withdrawn. I think that disposes of this.

Mr. Rassner: I hardly think so. The deposition of Dr. Hull shows that Mr. Hopkins made it quite clear that he couldn't and wouldn't produce Dr. Jackson, so there was no point in delay.

The Court: You could have produced him.

Mr. Rassner: I didn't want to. I wanted to cross-examine him as a government witness.

* * *

Mr. Rassner: That is all. And, as I say, the fact that there would be no point in a delay appears in the very deposition because, just as your Honor has observed, Mr. Hopkins had no control over Dr. Jackson and couldn't produce him, and there would be no point in a delay. And as I didn't want his testimony as my witness de benne esse I certainly didn't feel that he would be a favorable witness to the plaintiff, and especially when Mr. Hopkins had told me that he denied that he was the operating surgeon. *I would like the record to show that Mr. Hopkins stated that his information was that Dr. Jackson denied that he was the operating surgeon.* (Emphasis supplied.)

The Court: Yes, he has so stated.
Mr. Hopkins: I have said that to your Honor.

* * *"

At the trial, appellant's counsel made the following motion, which was denied:

> "I move to strike the defendant's answer on the legal ground that they have deliberately defaulted in the stipulation to produce the examining and operating doctor on Decoration Day. Instead of producing the operating doctor they did produce a Dr. Ben L. Hull, who testified that he knew nothing about the operation to his personal knowledge. I consider this a deliberate default and move for dismissal of the answer.
>
> (As requested, argument not transcribed.)
>
> The Court: The motion is denied.
>
> Mr. Rassner: May I have an exception?
>
> The Court: Yes."

Reasons for Granting the Writ

I. The question presented herein involves an important question of federal procedure which has not been, but should be, settled by this court.

II. The question presented is of substantial importance in the effective administration of federal law.

III. The question presented involves the uniform application of the Federal Rules of Civil Procedure and the proper interpretation thereof in their application to the U. S. as a litigant.

IV. The question presented calls for the exercise of this court's supervisory power over practice and procedure in the federal courts.

POINT I

Respondent's consent to be sued requires it to comply with provisions of Federal Rules of Civil Procedure.

Respondent's consent to be sued is expressed in the enactment of the Federal Tort Claims Act, 28 USC 1346, *et seq.*

Having consented to be sued, it cannot be favored as a litigant and must be required to comply with the Federal Rules of Civil Procedure.

Shenker v. *U. S.*, 25 FRD 96, 98.

In *Shenker*, the court said:

> "(3) There can be little dispute that the Government is not immune to this procedural process. Like any other party to a civil litigation the Government is bound by the same rules which apply to all other litigants including the Federal Rules of Civil Procedure and its discovery remedies.[1]" (and cases cited in footnote 1)

POINT II

Respondent's failure to ascertain operating surgeon and failure to produce the operating surgeon is wilfull default and warrants the imposition of penalties.

The record below clearly and conclusively establishes that respondent stipulated to produce the operating surgeon for examination, as required by petitioner's notices (*supra*, pp. 4, 6-7, 9-10).

The record also clearly and conclusively establishes that respondent failed to ascertain the identity of the operating surgeon and produced a Dr. Hull, who stated he did not perform the operation (*supra*, pp. 9-10).

Respondent, in this regard, although it repeatedly referred to Dr. Jackson as the operating surgeon, reported to the court that Dr. Jackson denied he operated on petitioner and that Dr. Jackson named Dr. Ware as the operating surgeon (p. 10, *supra*).

Despite this information, known only to respondent, Dr. Ware was not produced, nor was explanation made of the failure to produce Dr. Ware.

Clearly, therefore, respondent's lack of diligence in ascertaining which of its employees: Dr. Hull, Dr. Jackson or Dr. Ware, operated on petitioner is a wilful disregard of its obligation to comply with petitioner's notice of examination and the stipulation entered into by the parties in furtherance thereof.

This wilful default warrants the imposition of penalties and petitioner's motion to strike the answer should have been granted.

Bourne v. *Romero*, 23 FRD 292, 295.

In *U. S.* v. *3963 Bottles*, 265 F. 2d 332, the court said at pp. 336, 337:

> "The disjunctive wording of the rule, above, would seem to indicate that a showing of wilfulness is necessary only on failure to appear for deposition. Assuming that such is not the case, however, we hold that what is intended by 'wilful failure' to comply with the rule is any intentional failure as distinguished from involuntary noncompliance. No wrongful intent need be shown. Brookdale Mill, Inc. v. Rowley, 6 Cir., 1954, 218 F. 2d 728, 729."

See, also, *Societe Internationale, etc.* v. *Rogers*, 78 S. Ct. 1087, 357 U. S. 197, at page 1093:

> "[5] In our opinion, whether a court has power to dismiss a complaint because of noncompliance with a production order depends exclusively upon

> Rule 37, which addresses itself with particularity to the consequences of a failure to make discovery by listing a variety of remedies which a court may employ as well as by authorizing any order which is 'just.' There is no need to resort to Rule 41 (b), which appears in that part of the Rules concerned with trials and which lacks such specific references to discovery. Further, that Rule is on its face appropriate only as a defendant's remedy, while Rule 37 provides more expansive coverage by comprehending disobedience or production orders by any party."

In the face of respondent's wilful failure to identify the operating surgeon, respondent's argument below, that petitioner should have subpoenaed Dr. Jackson,[1] clearly is untenable, as respondent reported to the trial court that Dr. Jackson denied operating.

Assuming, *arguendo*, Dr. Jackson to be the operating surgeon, respondent, having stipulated to produce him, was under the obligation to subpoena him if that was necessary. There was no reason to shift this burden to petitioner.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that this petition be granted and that this Court direct respondent's answer be stricken and default judgment awarded petitioner for respondent's wilful failure to comply with petitioner's deposition notice and the parties' stipulation in furtherance thereof.

Respectfully submitted,

JACOB RASSNER,
Counsel for Petitioner.

---

[1] This assumes Dr. Jackson was within the subpoena power of the District Court, *i.e.* within 100 miles, and it appears he was not, as he was alleged to be in Baton Rouge, La. (*supra*, pp. 6-7).

APPENDIX

Court of Appeals Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventh day of October, one thousand nine hundred and sixty-four.

Present:

HON. LEONARD P. MOORE,
HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
Circuit Judges.

PETER GOLDBERG,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment and order of said District Court be and they hereby are affirmed with costs to the appellee.

A. DANIEL FUSARO,
Clerk.

Court of Appeals Opinion

PER CURIAM:

This is a civil non-jury case for damages claimed to have resulted from defendant's negligence. In open court plaintiff withdrew any claim for malpractice, leaving only the claim that plaintiff's injuries were caused by a fall from a defective wheel chair provided by defendant. The record amply supports the trial court's finding that the X-rays clearly establish that the slipping of the Smith-Peterson nail took place before plaintiff's alleged fall and that the alleged fall was not the proximate cause of the injuries which plaintiff claimed to have suffered.

The motion to strike defendant's answer made on the day of trial was properly denied. No request was made to take the testimony of the operating surgeon, Dr. Jackson, or for an adjournment of the trial.

Subsequent to trial, plaintiff moved to set aside the judgment or, in the alternative, for a new trial. Rule 59, F. R. C. P. Plaintiff failed to show any prejudice caused by the absence of the operating surgeon. He had voluntarily withdrawn his claim for malpractice and had the testimony of his own medical expert both as to operative procedures and the X-rays.

Judgment affirmed.

District Court's Oral Opinion

(239) * * *

The Court: Gentlemen, I have given thought and study to this case. It appears to me, and I find from all of the evidence, that the second operation which was performed at the Staten Island Hospital in the month of April 1959, in which a prosthesis was inserted in the femur after an attempt had been made to wire the femur, was not proximately caused by any negligence of the government, if there was any negligence, and I do not pass on that question.

After consideration of the evidence and testimony here and after viewing the x-rays myself with some care, and you will recall that I asked a number of questions about the x-rays on my sui sponte because I was most interested in what they showed, it appears to me that while the x-ray of March 17, 1959, taken at the time of the first open reduction, shows what is then apparently a satisfactory result, the x-ray of March 19, 1959 shows also a reasonably satisfactory result, the x-ray of March 23rd shows a marked deterioration of the situation in the head of the femur and of union and of the position of the nail; there has been a deterioration (240) from a good valgus position in the first instance, that is, in the first two x-rays immediately after the distortion of the limb. There has been some rotation of the head of the femur so that the head of the femur rotates more upwardly, thus distorting the junction with the neck and shaft of the femur, and that that condition, if anything, that distortion, is shown to have been considerably worse on March 25th. There is no significant change between the x-ray taken on March 25 and the x-ray taken at the Staten Island Hospital on April 4.

The plaintiff's case is predicated upon an occurrence which is alleged to have taken place at March 28 arising

out of the claimed tipping over of a wheelchair. There is reference in the hospital record of the Gorgas Hospital to some sort of wheelchair incident on that day, referring to the complaint about a jarring of the wheelchair.

Now without passing one way or the other on the question of whether or not the government was negligent with respect to the so-called wheelchair incident, I find from all of the evidence that the wheelchair incident, whatever it amounted to, was not the proximate cause of the further operation and insertion of the prosthesis and that, therefore, the plaintiff has failed to establish an essential element of its case, and judgment must be for the defendant United States, and I so find.

Mr. Rassner: May I have my exception?

The Court: You may of course have an exception. I may also say, so that the record will be complete, I quite understand here that by stipulation the claim for alleged malpractice has been withdrawn and discontinued. That claim was not before me, and I do not of course purport to pass in any way on evidence with respect to malpractice because there was no such evidence before me.

Mr. Rassner: May I have the record show that your decision is without prejudice to any right that we may have by way of malpractice?

Mr. Hopkins: Oh, no.

Mr. Rassner: In view of the state of the record, in the way the government changed its position and violated—

The Court: No, I will not do that, Mr. Rassner. I will simply let the record stand as it is, and you can deal with it as you wish. I will not—

Mr. Rassner: Then it is neither with or without prejudice.

The Court: There is a stipulation withdrawing the claim.

Mr. Rassner: Yes.

The Court: And whatever comfort you can find from that stipulation you can take.

Judgment will be entered for the defendant accordingly, and I think that disposes of the matter.

I think the record should also show that in view of my failure to find a necessary element of proximate cause as being established by the plaintiff, I do not pass on any question raised by the government's defense of release.